Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENTS MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

Counsel for Respondents Martin Exploration Management Company and Colorado Energy Corporation

[Counsel for Additional Respondents are listed inside]

JEFFREY S. DAVIDSON
Counsel of Record
STEPHEN A. HERMAN, P.C.
JAMES D. SENGER
YOSEF J. RIEMER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Dated: February 16, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

55 pp

AMOCO PRODUCTION COMPANY
WILLIAM T. BENHAM *
200 East Randolph Drive
P.O. Box 5910-A
Chicago, Illinois 60680
(312) 876-7941

BHP PETROLEUM COMPANY, INC.
WILLIAM S. MARTIN *
5051 Westheimer
1300 Post Oak Tower
Houston, Texas 77056
(713) 780-5313

CITIES SERVICE OIL & GAS CORP.
MICHAEL L. PATE *
P.O. Box 300
Tulsa, Oklahoma 74102
(918) 561-4541

GRACE PETROLEUM CORPORATION
CHARLES H. SHONEMAN *
BRACEWELL & PATTERSON
2000 K St., N.W., Suite 500
Washington, D.C. 20006-1809
(202) 828-5800

OHIO OIL AND GAS ASSOCIATION
M. HOWARD PETRICOFF *
W. JOHNATHAN AIREY
VORYS, SATER, SEYMOUR
AND PEACE
52 East Gay St.
Columbus, Ohio 43215
(614) 464-5414

PHILLIPS PETROLEUM COMPANY
JOHN L. WILLIFORD
CHARLES L. PAIN *
1258 Adams Building
Bartlesville, Oklahoma 74004
(918) 661-6355

ARCO OIL AND GAS COMPANY
HARRIS S. WOOD *
P.O. Box 2819
Dallas, Texas 75221
(214) 880-4869

CHEVRON U.S.A., INC.
JAMES B. ATKIN *
DAVID J. EVANS
PILLSBURY, MADISON & SUTRO
1667 K St., N.W., Suite 1100
Washington, D.C. 20006
(202) 887-0300

EXXON CORPORATION
C. ROGER HOFFMAN
DOUGLAS W. RASCH *
P.O. Box 2180
Houston, Texas 77001
(713) 656-1691

INDEPENDENT OIL AND GAS
ASSOCIATION OF WEST VIRGINIA
R. GORDON GOOCH *
TRAVIS AND GOOCH
1101 15th St., N.W., Suite 1200
P.O. Box 65688
Washington, D.C. 20035-5688
(202) 457-9100

PLACID OIL COMPANY
RONALD D. HURST *
PAUL W. HICKS
3900 Thanksgiving Tower
Dallas, Texas 75201
(214) 880-1000

PENNZOIL COMPANY
JOHN B. CHAPMAN *
KATHELENE E. MAGRUDER
Pennzoil Place
700 Milam Street
Houston, Texas 77002
(713) 546-8859

JOHN MCDONALD
RICHARD E. POWERS, JR.
BUTLER & BINION
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20005
(202) 466-6900

QUESTION PRESENTED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 states that whenever natural gas is qualified in two NGPA pricing categories—one providing a "maximum lawful price," the other providing an "exemption from such a price"—the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

This case presents the question of whether FERC may preclude producers from pricing and selling such dually-qualified gas in a category providing a "maximum lawful price" when that category results in the highest sale price.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,
Petitioners,
v.
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENTS MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

STATEMENT

This case presents the question of whether the incentive price for price-regulated natural gas will continue to "be applicable" to such gas under the terms of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982), if the gas also qualifies in a price-deregulated category. It does not involve an attempt to "choose"

price-regulation over price-deregulation. Pet. Br. 3.[1] It does not involve an attempt to "switch back and forth" between price-regulation and price-deregulation. Pet. Br. 28. Instead, it involves an attempt to determine the "applicable" NGPA pricing category for dually-qualified natural gas, so as to permit private contract pricing provisions to determine the proper sale price.

Section 101(b)(5) of the NGPA determines the "applicable" NGPA pricing category for dually-qualified gas:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

This case turns on the meaning of these words. Do they evince an intent to establish a rule requiring that the price-deregulated category always apply? Or do they evince an intent to place dually-qualified gas in the category which results in the highest sale price?

FERC has taken the former position. Approaching the issue with its own agenda, FERC argues that Congress meant for the price-deregulated category to always apply, bu' rather than simply saying that, chose instead to point to the category "which could result in the highest price" on the belief that contracting parties would com-

[1] "Pet. Br." refers to the brief of Petitioner Federal Energy Regulatory Commission in No. 87-363. "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-363. The statement of the parties to these proceedings, pursuant to Sup. Ct. R. 28.1, appears at pp. i-ii and the addendum to the "Brief in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," filed October 30, 1987.

pare the existing "maximum lawful price" for the price-regulated category (a finite sum) to the theoretical "maximum" price for the price-deregulated category (an infinite sum) and reach the same result in every case. Pet. App. 111a; Pet. Br. 22. Since the infinite sum is always "highest," the price-deregulated category always applies. *Id.*

A unanimous panel of the United States Court of Appeals rejected this interpretation. Pet. App. 1a-33a. Based on the unambiguous language of section 101(b)(5), the court held that Congress did not intend to require a pointless, one-sided "comparison" of the finite to the infinite. Pet. App. 16a. Instead, the court found that Congress intended to place dually-qualified gas in the category which resulted in the highest sales price under the terms of the prevailing gas sales contract. Pet. App. 16a. If the contract pricing provisions establish a higher price for price-regulated than price-deregulated gas, the regulated pricing category "shall be applicable." 15 U.S.C. § 3311(b)(5).

A. The Natural Gas Policy Act.

The Natural Gas Policy Act contains carefully worded compromise legislation, meticulously crafted during sixteen months of discussion and debate. 15 U.S.C. §§ 3301-3432; *see generally* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980). The final statute reflects "the product of a Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage." *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983). At the time of the NGPA, the nation faced a "serious production shortage[]" as a result of the pricing policies implemented by FERC's predecessor, the Federal Power Commission ("FPC"), under the terms of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982). *Mid-Louisiana*, 463 U.S. at 330;

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 420 (1986). Interstate gas prices, which the FPC had determined on a "historical-cost-based," multi-tiered "rate scheme," remained "substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate." *Mid-Louisiana*, 463 U.S. at 330-31. As a result, the interstate market had begun to command supplies of higher-priced gas from unregulated foreign suppliers, a development which concerned the members of Congress.[2] Domestic suppliers, meanwhile, had little incentive to develop additional supplies for the interstate market. *Mid-Louisiana*, 463 U.S. at 330-31; *Transcontinental*, 474 U.S. at 420-21; Note, 59 Tex. L. Rev. at 112. Clearly, "a new system of natural gas pricing was needed to balance supply and demand." *Transcontinental*, 474 U.S. at 421.

The two Houses of Congress disagreed on the proper approach. On one side, the House of Representatives had passed a bill extending federal price ceilings to all sales, interstate and intrastate, at levels high enough to provide increased incentives for production. H.R. 8444, 95th Cong., 1st Sess. (1977). The stated purpose of this bill was "to bring the natural gas market into better balance by reducing the demand for natural gas and increasing the supply through the establishment of a uniform and incentive-based pricing system for new natural gas which provides fair and equitable producer revenues and protects consumers." H.R. 8444, § 401(b)(1), 95th Cong., 1st Sess. (1977).

On the other side, "[t]he Senate-passed bill embodied a significantly different approach to the natural gas

[2] *See, e.g.*, 124 Cong. Rec. 28,891 (1978) (Sen. Randolph) ("We need assurances of a stable rate of production and supply. This will not be accomplished by relying on high prices from [sic] liquid natural gas from such countries as Algeria, Mexico and Indonesia.").

pricing policy issue than that adopted by the House."[3] Although the "goals of nearly every Member of the Senate [were] the same—an assured supply of natural gas, an attempt to reduce our national dependence on foreign oil and an ultimate concern for the energy health of this country," the "suggested routes for achieving those goals [were] apparently as numerous and as divergent as the membership of this body." 124 Cong. Rec. 31,838-39 (1978) (Sen. Hatfield). The final Senate bill would have left intrastate sales unregulated and deregulated most new gas in two years. S. 2104, 95th Cong., 1st Sess., 123 Cong. Rec. 32,306 (1977).

Faced with "a close vote in the Senate to deregulate and a close vote in the House to regulate," the Conference Committee "did the most sensible thing that one could do under all the circumstances." 124 Cong. Rec. 28,634-35 (1978) (Sen. Jackson). The Committee reconciled "these two very different bills" and reached a "compromise that Democrats and Republicans, consumers and producers, could stand behind." Conf. Rep. at 68; 124 Cong. Rec. 31,844 (1978) (Sen. Byrd). In the end, the result was "a bill which does not give any of the players everything he would like"; "[i]f you are a total regulator or if you are a total deregulator, this bill will not please you." 124 Cong. Rec. 31,842-43 (1978) (Sen. Muskie); 124 Cong. Rec. 28,882 (1978) (Sen. Bumpers).

Under the NGPA, Congress gave FERC "a fundamentally different regulatory obligation, a narrower authority" to administer pricing than either FERC or the FPC had under the Natural Gas Act. *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). While the NGA authorized those agencies to set prices under a broad, discretionary "just and reasonable" standard, the NGPA charged FERC only with

[3] H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 8983, 8984 [hereinafter "Conf. Rep."].

administering a national "incentive pricing scheme" under express guidelines from Congress. 15 U.S.C. §§ 3312-19; *Mid-Louisiana*, 463 U.S. at 322, 333; *Amoco Production Co. v. Western Slope Gas Co.*, 754 F.2d 303, 305 (10th Cir. 1985).

At the outset, Title I of the NGPA established "an exhaustive categorization of natural gas production." *Mid-Louisiana*, 463 U.S. at 332-33. Eight categories are described in sections 102 through 109 of the statute. 15 U.S.C. §§ 3312-19. Because these categories were "designed to be exhaustive," "all natural gas production falls within at least one of the categories." 463 U.S. at 333.

The statute then "explicitly establishes an incentive pricing scheme that is wholly divorced from the traditional historical-cost methods" that the FPC had applied in implementing the NGA. *Id.* For each NGPA category, Congress either set a maximum lawful price or provided FERC with express guidelines for the calculation of such a price. 15 U.S.C. §§ 3312, 3319; *Mid-Louisiana*,, 463 U.S. at 332. These price ceilings varied widely between the categories, reflecting Congress' desire to "provide investors with adequate incentives to develop new sources of supply" while maintaining a consumer price protection approach on old, existing sources of supply. *Mid-Louisiana*, 463 U.S. at 334; Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980).

Certain NGPA price ceilings ran counter to the interests of producers. Section 105, for example, "expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time." *Transcontinental*, 474 U.S. at 421; *Oklahoma v. FERC*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Although the elected representatives of the producing states had attacked this section as extending "price controls and regulation to the only free market we have,

the intrastate market," Congress enacted the section and established a specific pricing formula for intrastate gas. 124 Cong. Rec. 28,589 (1978) (Sen. Hansen); 15 U.S.C. § 3315. At the same time, Congress also established a relatively low ceiling price for "old" interstate gas under section 104, reasoning that "previously dedicated gas needs no incentive since, by definition, it is economically producible under old prices." 15 U.S.C. § 3314; Note, 59 Tex. L. Rev. at 119.

In other NGPA sections, however, Congress favored the producers with incentive pricing on the belief that "[w]hether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, . . . the Nation's energy needs justified the higher, statutory rate." *Mid-Louisiana*, 463 U.S. at 335-36. These sections created production incentives by concentrating the "rewards of higher prices where they are most needed—on the development of new, high-cost gas." 124 Cong. Rec. 28,633 (1978) (Sen. Jackson); Note, 59 Tex. L. Rev. at 119. Accordingly, Congress reserved its highest incentive prices for "new gas" under sections 102 and 103, "high-cost gas" under section 107, and "stripper well gas" under section 108. 15 U.S.C. §§ 3312, 3313, 3317, 3318.

Two of these incentive categories are principally relevant to this case: "stripper well" gas under section 108, and high-cost "tight formation gas" under section 107 (c)(5). 15 U.S.C. §§ 3317(c)(5), 3318. "Section 108's purpose is to provide a special price for wells with low production volumes because, absent an incentive price, the revenues therefrom may not cover the out-of-pocket operating costs of maintaining production." *Ecee, Inc. v. FERC*, 645 F.2d 339, 355 (5th Cir. 1981). Section 107 (c)(5) was designed to encourage production from conditions that FERC determined to present "extraordinary risks or costs," such as "tight formations with little permeability, including Western tight sand formations."

Conf. Rep. at 87; 15 U.S.C. § 3317(c)(5). Under this section, Congress intended for FERC to designate such conditions "in advance of drilling activity, in order to create price incentives." Conf. Rep. at 88. Congress further emphasized that the special incentive prices under section 107 "are not intended . . . to be cost-based in nature, and do not require cost justification." *Id.* Instead, those prices would reward the producer for "extraordinary risks" inherent in the drilling activity. *Id.*

Having defined a total of eight incentive and non-incentive pricing categories, Congress then provided for the phased-in price-deregulation of *certain* of these categories during the years 1979-87. Section 121 of the NGPA sets forth this system of phased-in, partial deregulation. 15 U.S.C. § 3331.[4] In drafting this section, the Conference Committee carefully noted that it "does not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. Categories that are not mentioned, including "old" gas under section 104, high-cost tight formation gas under section 107(c)(5), and stripper well gas under section 108, are never price deregulated. 15 U.S.C. § 3331; Conf. Rep. at 92; *Mid-Louisiana*, 463 U.S. at 336 n.14.

Against this background of complex, overlapping categories and prices, Congress established several "rules of general application to be used in interpreting this Act." Conf. Rep. at 74; 15 U.S.C. § 3311(b). One such rule of construction defines the relationship between the maxi-

[4] In section 121, Congress provided that deep wells, geopressured brine wells, coal seam wells and Devonian shale wells would deregulate and become exempt from any price ceiling on an effective date of November 9, 1979. 15 U.S.C. §§ 3317(c)(1)-(4), 3331(b). New wells under section 102, certain new onshore production wells under section 103, and certain intrastate wells under sections 105 and 106, would deregulate and become exempt from any price ceiling on January 1, 1985. 15 U.S.C. § 3331(a). Certain other new onshore production wells would deregulate and become exempt from any price ceiling on July 1, 1987. 15 U.S.C. § 3331(c).

mum lawful prices (or exemptions therefrom) established in the NGPA and the contract prices specified in gas purchase agreements between buyers and sellers. 15 U.S.C. § 3311(b)(9).[5] In section 101(b)(9), Congress confirmed that the NGPA does not entitle the seller to any particular gas price. Congress contemplated that private contracts, not the NGPA, would govern the relationships of buyers and sellers, and "section 101(b)(9) is Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship." *Pennzoil Co. v. FERC*, 645 F.2d at 375. For any "first sale" of natural gas, the sale price is equal to the contract price so long as that contract price "does not exceed" the applicable category's ceiling price. 15 U.S.C. § 3311(b)(9). FERC has no authority to "nullify" a lawful first sale contract price. *Id.*

One other "rule of general application" is the very heart of this case. In section 101(b)(5), Congress provided a rule for the inevitable occasions when a single well qualified in more than one price-regulated (or deregulated) category:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a

[5] Section 101(b)(9) provides:

> **Effect on contract price.** In the case of (A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or (B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such exemption from such a maximum lawful price, shall not supercede or nullify the effectiveness of the price established under such contract.

15 U.S.C. § 3311(b)(9).

price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

Gas qualifying under more than one category has been termed "dual category" or "dually-qualified" natural gas. Pet. App. 73a-75a. For example, certain stripper wells that qualified for incentive pricing under section 108 by virtue of their low output might also qualify as "old" wells under section 104, "new" natural gas wells under section 102, or Devonian shale wells under section 107(c)(4). Pet. App. 73-75a. Certain "tight formation" wells that have qualified for incentive pricing under NGPA section 107(c)(5) could also qualify as "new" wells under section 102 or 103.

In each of these cases, section 101(b)(5) expressly assures the producer that "the provision which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). "[T]he provisions that permit the seller to obtain the highest price applies." Conf. Rep. at 74. In a compromise statute filled with provisions both beneficial and detrimental to the producer, section 101(b)(5) stands out as a key provision which favors the interests of the producer.

B. Natural Gas Category Determinations.

As a threshold matter, the operation of the NGPA incentive pricing scheme depends upon the determination of the appropriate category or categories for each individual well. Although Congress created a "comprehensive" and "exhaustive" set of eight natural gas categories, it did not presume to determine the proper categories for thousands of wells located throughout the United States. Nor did Congress want FERC to do so. Instead, Congress gave this authority to state and federal agencies "having regulatory jurisdiction with respect to the production of natural gas." 15 U.S.C. § 3413(c).[6] The determinations would be made upon application from the producer, subject to FERC review, but "there is no intention to allow the Commission to 'second guess' the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission." Conf. Rep. at 118.

Under this system, the producer must consider the terms of his contract, the terms of the NGPA, and the characteristics of his well before initiating his application. "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,364 (1978) (Explanation Statement prepared by Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). And, "[i]f a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

C. Order Nos. 406 and 406-A.

Against this statutory background, FERC issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, describing proposed rules designed to implement NGPA section 121(a) and facilitate the next phase of deregulation, which was then scheduled for January 1, 1985. Pet. App. 34a-60a. Among other things, FERC proposed that individual well category determinations under section 503 would continue after January 1, 1985 for all categories, including those that were slated for deregulation on that date. Pet. App. 38a.

---

[6] With regard to federal lands, this jurisdiction rests with the Bureau of Land Management of the United States Department of the Interior. *See Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 781 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 748 (1988).

Relatedly, FERC proposed that producers who had qualified wells as "new tight formation gas" under section 107(c)(5) prior to January 1, 1985 had necessarily filed "the same information, in addition to other information" as was required to qualify under sections 102 and 103. Pet. App. 41a. FERC therefore proposed to "implicitly" determine that any well qualified as "new tight formation gas" under section 107(c)(5) also qualified in one or both of those price-deregulated categories. Pet. App. 41a-42a.

Finally, FERC proposed that based on the "overall scheme" of the NGPA, it "believe[d] that Congress intended all price controls for gas specified in section 121 to terminate on January 1, 1985, whether or not the gas continued to qualify for a regulated price." Pet. App. 43a-44a. While conceding that section 101(b)(5) "[a]rguably" provided that the gas would "remain regulated if the regulated price is higher than the deregulated price," FERC queried "whether Congress intended this section to supersede the explicit statutory requirement of deregulation in section 121." Pet. App. 44a.

On November 16, 1984, FERC issued its "final rule" in the form of Order 406. 18 C.F.R. § 270.208 (1987); Pet. App. 61a-103a. FERC focused much of its attention on the "significant deregulation issue" presented by dually-qualified natural gas. Pet. App. 74a. Claiming that section 101(b)(5) was "helpful, but not dispositive" on the issue, FERC turned instead to its own perception of "Congressional intent," the "overall scheme" of the NGPA, and the "mandatory" nature of deregulation under section 121. Pet. App. 75a-79a. Here FERC concluded that "[i]t is our belief that the statutory intent to deregulate takes precedence over the statute's increased supply objective." Pet. App. 77a. Based on this "belief," FERC reaffirmed its "position" that "[g]as that is dually-qualified must be considered deregulated under the NGPA." Pet. App. 75a. FERC then rejected producers' claims of reliance on the regulated incentive prices for

dually-qualified gas, finding that their reliance was "misplaced" because "[i]t should have been clearly understood that the incentive price was to be statutorily removed." Pet. App. 79a.

FERC then turned to the proper treatment of "new tight formation gas" under section 107(c)(5). Here again, FERC reaffirmed its view that such gas was "implicitly" qualified as section 102(c) or 103 gas because "[s]uch gas is obviously qualified for both categories . . ., regardless of whether that was explicit at the time that the determination was made." Pet. App. 82a. When coupled with FERC's earlier ruling on the "mandated" deregulation of dually-qualified gas, this ruling enabled FERC to insure that contract pricing provisions entitling the producer to regulated incentive prices for price-regulated gas would *not* apply to section 107(c)(5) wells, even though that category remained subject to price regulation. Pet. App. 81a-82a.

Eighteen parties, including the respondents in this case, sought rehearing of Order 406. Pet. App. 105a. FERC acted on those petitions in Order 406-A, issued December 21, 1984. Pet. App. 104a-126a. On the issue of dually-qualified gas, FERC maintained its "position" that "section 121 mandates deregulation," even though section 121 said nothing on the subject of dually-qualified gas and, indeed, did "not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. At the same time, however, FERC also proclaimed a new interpretation whereby section 101(b)(5) itself "compels" the deregulation of dually-qualified gas. Pet. App. 111a. FERC reasoned that since section 101(b)(5) directs that the NGPA category which "could result in the highest price" shall apply, it was proper to compare the theoretical "maximum" price under price-deregulation (an infinite sum) with the real maximum lawful price under existing regulation (a finite sum). *Id.* Under this "comparison,"

the price-deregulated category would *always* carry the higher price, so that the deregulated category would *always* apply to gas that was qualified in both regulated and deregulated categories. *Id.*

D. The Court of Appeals' Decision.

A unanimous panel of the United States Court of Appeals rejected this novel construction of the statute. Pet. App. 1a-24a. Acting on petitions for review filed by the respondents in this proceeding, the court of appeals held that section 101(b)(5) required application of the pricing category "which could result in the highest price" under the terms of the existing private sales contract for the gas. Pet. App. 16a-17a; 15 U.S.C. § 3311(b)(5).

The court discerned that the NGPA pricing system was an "intricate balance of uniform price ceilings, incentive prices, and partial phased deregulation." Pet. App. 5a. In section 121, "[t]he deregulation proponents achieved a phased elimination of many, but not all" of the price ceilings. Pet. App. 7a. "[O]ld gas is not deregulated" and "of particular importance in this case, the NGPA does not include § 107(c)(5) tight formation gas or § 108 stripper well gas on the face of the deregulation provisions of § 121." Pet. App. 7a-8a.

FERC had interpreted section 121 to "mandate" deregulation of any gas determined to be "in one of the listed categories, . . . even if the gas has also been determined to be in a category that is not listed." Pet. App. 10a. The Conference Committee Report, however, had emphasized that section 121 "does *not* provide for deregulation of any natural gas production not specifically enumerated." Conf. Rep. at 92 (emphasis supplied). And this Court had held that section 121 provided for the "'ultimate decontrol of *a number of categories* of natural gas.'" Pet. App. 11a (quoting *Mid-Louisiana*, 463 U.S. at 336 n.14) (emphasis in original). Therefore, the court of appeals held that section 121 was ambiguous with respect to the treatment of gas qualified in both listed and unlisted categories. Pet. App. 11a.

In section 101(b)(5), however, Congress had "anticipated precisely this question." Pet. App. 11a. Recognizing that section 101(b)(5) applied to gas qualified in both regulated and deregulated pricing categories, the court held that this section addressed the very "question of which category shall apply when gas has been determined to qualify both for a regulated category and a deregulated category." Pet. App. 15a.[7] The category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5); Pet. App. 16a-17a.

Here, the court noted that FERC construed the section "to provide the same answer to this question in every case: the deregulated category will always apply." Pet. App. 15a. This construction, however, was based "on the obvious truth that the price of deregulated natural gas in an open market 'could' theoretically reach infinity." *Id.* According to FERC, the proper comparison was between this theoretical price and the very real ceiling price in existence at that time, rather than any similarly theoretical ceiling price. Pet. App. 15a-16a.[8]

---

[7] In the court of appeals, FERC had argued that although section 101(b)(5) referred to categories providing for an "exemption from such a price," this language did *not* refer to the deregulated categories. Pet. App. 14a-15a. The court of appeals rejected this argument, noting that FERC itself had used the term "exemption" to refer to deregulated categories. *Id.* Indeed, FERC had affirmatively stated that section 101(b)(5) applied to dually-qualified regulated-deregulated gas. *See, e.g.*, Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23 (1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible, including a deregulated price, if applicable."). FERC has expressly elected to "not renew" this argument to this Court. Pet. Br. 21 n.20.

[8] As the court of appeals recognized (Pet. App. 15a-16a), FERC has the authority to adjust certain ceiling prices at will. *See* 15

In rejecting this strained construction, the court held that the word "could" makes sense "only in the context of how gas sales actually occur." Pet. App. 16a. Congress understood that gas sales occur under the terms of private contracts, not under the terms of the NGPA. Pet. App. 16a-17a. Accordingly, the proper comparison was between the contract price for price-regulated gas in the regulated category and the contract price for price-deregulated gas in the deregulated category. *Id.* In the end, the NGPA provision that "could result in the highest price" under the contract would apply. *Id.*

In reaching this decision, the court also rejected FERC's view that the producers were seeking a "choice" or "election" between the price-regulated and price-deregulated categories. Pet. App. 18a. The court found that section 101(b)(5) "does not speak in terms of a choice or an election," but rather states that "whichever category could produce a higher price *shall* apply." *Id.* (emphasis in original). The producers have no "choice" in the treatment of dually-qualified gas. *Id.* The producers do, however, have a "choice as to which category or categories for which they seek to qualify particular gas." *Id.* And it was for this reason that FERC's views on the "implicit" qualification of all section 107(c)(5) "new tight formation gas" as "new gas" under sections 102 and 103 could not stand. Pet. App. 18a-19a. The court held that "[t]here is no support for such automatic determinations in the NGPA." Pet. App. 18a. Because there was no basis for the "assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in § 503," FERC's conclusions on the treatment of new tight formation gas could not be upheld. Pet. App. 19a.

U.S.C. §§ 3314(b)(2), 3317(b). In theory, then, these ceilings "could" reach the same infinite values that FERC ascribes to the deregulated categories.

SUMMARY OF ARGUMENT

The unanimous opinion of the court of appeals is correct. Section 101(b)(5) requires that natural gas which is dually-qualified in price-regulated and price-deregulated categories shall be treated in the category that "could result in the highest price" under the terms of the existing private sales contract for that gas.

A. The text of section 101(b)(5) is clear and unambiguous: for all "sales qualifying under more than one provision,"—including provisions "providing for any maximum lawful price" or for "any exemption from such a price"—the provision "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). This rule means what it says. When gas is qualified in two NGPA categories, each with a different "sale" price under the terms of the prevailing contract, the category which could result in the "highest price" shall apply.

Congress chose these words for a reason. At the time of enactment, Congress understood that gas would be priced and sold under the terms of private contracts, most of which would set different prices for different categories of gas, including price-regulated and price-deregulated categories. Therefore, a rule was needed for those cases where a given well qualified in two or more categories. The issue was which category would apply for purposes of the contract pricing provisions, so as to permit *those provisions* to determine the proper sale price. Clearly, the NGPA itself would not require or "result" in the payment of *any* particular price for dually-qualified (or singly-qualified) gas.

With this in mind, Congress enacted a provision stating that whenever a particular well qualified in both a price-regulated and a price-deregulated category, the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). Congress would not have enacted this provision if it wanted to establish

a simple rule requiring that all dually-qualified gas be treated as price-deregulated gas. Clearly, Congress did not envision any such automatic rule. What Congress wanted was a comparison of the prices "which could result," *i.e.*, a comparison of the actual sale prices payable under the terms of the sales contract covering the well in question.

Seeking to escape the text of the statute, FERC now admits that the statute requires a price comparison. Pet. Br. 22-23. But FERC contends that since the NGPA is not "concerned" with private contract prices, the proper "comparison" is between the existing statutory incentive price and the theoretically infinite exempt price potentially available at some indefinite future time. Because this speculative infinite price is always "higher" than any finite price, the exempt category always applies. In short, FERC believes that Congress chose to say that "the higher of A or B applies" when it knew all along that B was *always* higher and when it could have said "B always applies." This theory defies common sense.[9]

B. The legislative history of the NGPA solidly supports the construction adopted by the court of appeals. Not only does that history reveal no "clearly expressed legislative intention" contrary to the language of the statute, it actually contains two authoritative statements supporting its natural meaning. Moreover, section 101(b)(5) is fully consistent with the "broad purpose" of the NGPA. As this Court has recognized, the "broad purpose" of the NGPA was to assure adequate

[9] FERC is obviously correct in noting that the NGPA "leaves the establishment of actual sale prices to private decision." Pet. Br. 19. That is just the point. Because sale prices are privately established, a comparison of the sale prices for price-regulated and price-deregulated gas will yield different results in different cases. The purpose of the comparison is to determine the higher of those two prices in a particular case. In contrast, FERC proposes a purposeless "comparison" that always yields the same result.

supplies of natural gas at fair prices. It was *not* to achieve price-deregulation in the abstract. Phased-in, partial deregulation was simply one *means* of fulfilling the "broad purpose" of adequate supplies at fair prices. Incentive pricing for difficult-to-produce gas was another. In this case, section 101(b)(5) simply operates to insure producers the incentive pricing they relied upon in their search for difficult-to-produce gas.

C. Because the intent of Congress is clear and unambiguous, the Court should not defer to a contrary interpretation of the agency. FERC has no power to correct perceived flaws in the statute it administers. If FERC believes that a new compromise is justified under today's economic conditions, FERC should raise the matter with Congress, not this Court. Elected representatives of the producing and consuming states could then debate not just section 101(b)(5), but other provisions of the statute as well.

D. In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 suggest that any reference to that section is "simply wrong" because section 121 unambiguously mandates the deregulation of dually-qualified gas. Br. 10-11. Even FERC does "not renew" this argument, and with good reason. Basic tenets of statutory construction establish that Congress enacted section 101(b)(5) to directly address the question of dually-qualified gas. In contrast, section 121 does not even mention dually-qualified gas and, indeed, is limited in application only to the "specifically enumerated" categories. The silence of section 121, combined with the plain language of section 101(b)(5), requires that this case turn on section 101(b)(5).

E. In determining whether a well is dually-qualified for purposes of section 101(b)(5), it is necessary to focus upon the well category determinations made by the state and federal jurisdictional agencies with authority

to make those determinations. FERC has no power to make well category determinations under section 503 of the NGPA. 15 U.S.C. § 3413. FERC's ruling, therefore, that all new tight formation wells under section 107(c)(5) of the NGPA are "automatically" and "implicitly" new wells under section 102 or 103 exceeds the bounds of its authority.

ARGUMENT

There is no dispute that the NGPA reflected a carefully-crafted legislative compromise, designed "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Nor is there any dispute that this single "broad purpose" can be seen in a wide range of provisions, some of which favor the consumer, some of which favor the producer, and some of which are more neutral in their application. Some categories of gas are kept forever regulated at low prices.[10] Other categories of gas are kept forever regulated at higher prices. 15 U.S.C. §§ 3317(c)(5), 3318. Still other categories of gas are price-regulated initially and then deregulated over time as part of a system of phased-in, partial deregulation. 15 U.S.C. § 3331.

As part of this overall legislative compromise, Congress enacted a provision to cover those situations where gas qualified in more than one pricing category, including price-regulated and price-deregulated categories. This provision is section 101(b)(5). 15 U.S.C. § 3311(b)(5). In a complex and highly technical statute, with provisions both favorable and unfavorable to the producer, this one provision clearly and unambiguously favors the interests of the producer.[11] It does not say that dual-category gas

[10] For example, some old gas remains regulated at "below-market" ceiling prices ranging between $.50 and $1.00 per MMBtu. 15 U.S.C. § 3314; 53 Fed. Reg. 3,019, 3,020 (1988) (publication of current maximum lawful prices).

[11] To the extent that FERC wishes to characterize this provision as a "producer-assistance policy" (Pet. Br. 19), it should characterize other sections of the NGPA, such as section 104, as a "consumer-assistance policy." *See supra* note 10; *see also* A. Tussing & C. Barlow, *The Natural Gas Industry: Evolution, Structure & Economics* 114-16 (1984) (NGPA a "hodgepodge" of pro-consumer and pro-producer rules).

shall always be treated in the price-regulated category. It does not say that dual-category gas shall always be treated in the price-deregulated category. It says that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

FERC is now trying to construe this provision away. Relying on its own perception of the "overall scheme" of the NGPA, FERC argues for a construction that is at war with the words of the statute and devoid of support in the legislative history. This Court should reject FERC's construction and affirm the opinion of the United States Court of Appeals.

A. The Court of Appeals Correctly Concluded That When "Sales Qualify Under More Than One Provision," Section 101(b)(5) Requires That the Provision Which Could Result in the Highest Sale Price Shall Apply.

"The starting point in statutory interpretation is 'the language of the statute itself.'" *United States v. James*, 106 S. Ct. 3116, 3121 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The words of section 101(b)(5) are as follows:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one pro-

> vision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

FERC argues that this language means that whenever natural gas qualifies in both a price-regulated and a price-deregulated category, the deregulated category always applies. "The short answer," however, "is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). If Congress wanted to write section 101(b)(5) to deregulate all gas qualifying in both a regulated and a deregulated category, it surely would have done so. Congress easily could have written a single sentence which clearly and simply provided for the price-deregulation of all gas qualifying in both regulated and deregulated categories.[12] Congress did not do that.[13] Instead, Congress provided that the category "which could result in the highest

[12] FERC has suggested that the reason Congress did not provide that "all gas qualifying under any provision providing for an exemption from a maximum lawful price shall be considered exempt" was that Congress wanted to cover both the regulated-deregulated and the regulated-regulated cases in a "single sentence." Pet. Br. 24. In the unlikely event that this were true, Congress could have provided that "any gas qualifying under more than one provision providing a maximum lawful price shall be treated under the provision which sets the highest price, and any gas qualifying under any provision providing an exemption from such a price shall be considered exempt."

[13] *Compare North Haven Bd. of Education v. Bell*, 456 U.S. 512, 521 (1982) ("After all, Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)."); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381 (1987) ("Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option.").

price shall be applicable." 15 U.S.C. § 3311(b)(5). Neither Congress nor any other competent draftsman would use this language if it wished to reach the same result—price-deregulation—in every case. Congress chose its words for a reason, and it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section, as the Government's interpretation requires." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Township of Montclair v. Ramsdell*, 107 U.S. 147, 152(1883)). Surely, the Court cannot assume that Congress engaged in careless draftsmanship in a statute as carefully-crafted as the NGPA.[14]

Congress understood that natural gas is priced and sold under the terms of private contracts.[15] Congress further understood that NGPA provisions do not in fact *or theory* "result" in the payment of any price.[16] Those provisions can only "result" in prices to the extent that they are referenced or incorporated in the terms of pri-

[14] *Compare Griffin v. United States*, 537 F.2d 1130, 1136 (Temp. Emer. Ct. App.) ("[W]e should not be quick to assume accidental or careless language on the part of Congress where considerate purpose may be seen in the words it employed."), *cert. denied*, 429 U.S. 919 (1976).

[15] *See supra* pp. 8-9; *see also* Conf. Rep. at 120 ("the seller may collect . . . the appropriate maximum lawful price . . . if the contract so permits"); Conf. Rep. at 74 ("In no case may a seller receive a higher price than his contract permits."); 2A C. Sands, *Sutherland Statutory Construction* § 45.12 (4th rev. ed. 1984) (legislative language must be interpreted by courts on the assumption that the legislature was aware of relevant statutes and facts).

[16] FERC continues to recognize and emphasize this fact. *See* 53 Fed. Reg. 3,754, 3,756 (1988) ("The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price.").

vate contracts. Therefore, when Congress wrote a statute providing that the "provision which could result in the highest price shall be applicable," Congress understood what it was saying: when a well is dually-qualified in a price-regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply.[17]

"[G]iven the plain terms of the statute, 'it requires some ingenuity to create ambiguity.'" *United States v. James*, 106 S. Ct. at 3121 (quoting *Rothschild v. United States*, 179 U.S. 463, 465 (1900)). From the outset, FERC has demonstrated an unusual degree of ingenuity in this case. After twice attempting to avoid section 101(b)(5) altogether, FERC now concedes that that section controls the treatment of dually-qualified regulated-deregulated gas. Pet. Br. 21 n.20.[18] In abandoning its

[17] Throughout its brief, FERC attempts to create the impression that this reading of section 101(b)(5) will foment widespread regulatory chaos. *See, e.g.*, Pet. Br. 28. This is simply not the case. Like countless other parties to commercial contracts, gas buyers and gas sellers will perform the necessary comparisons and make the necessary price adjustments under the terms of their private contracts. Pet. App. 16a n.11. FERC will have no involvement whatsoever.

[18] FERC has continually shifted and modified its position on section 101(b)(5). In its Notice of Proposed Rulemaking, FERC took the position that section 121 mandated the deregulation of all dually-qualified regulated-deregulated gas, and that section 101(b)(5) was only "[a]rguably" involved. Pet. App. 44a. After receiving comments on the issue, FERC modified its position to assert that section 101(b)(5) was "helpful, but not dispositive." Pet. App. 78a. Then, when the court of appeals issued an opinion finding that section 101(b)(5) was not only "helpful" but also "dispositive" and adverse to FERC's approach, FERC modified its position for a third time, so that it is now claiming that section 101(b)(5) is "dispositive" and unambiguously *supportive* of its approach. Pet. Br. 21-27. Nowhere in the original Notice of Proposed Rulemaking did FERC articulate this theory of unambiguous, dispositive support.

earlier arguments, however, FERC remains unwilling to abandon its preconceived result.

Looking at the terms of the statute, FERC now admits that the category "which could result in the highest price" shall apply. 15 U.S.C. § 3311(b)(5). But FERC attempts to sidestep the natural meaning of these words by arguing that they refer to "the range of legally permitted possibilities." Pet. Br. 24. Therefore, in determining the price that "could result" for price-deregulated gas, FERC suggests that the Court should focus on the infinite price that "could" become available in some hypothetical world of the future. Pet. Br. 24-25. In determining the price that "could result" for price-regulated gas, however, FERC suggests that the Court should focus not on some equally hypothetical incentive price of the future, but on the maximum lawful price of today. *Id.* Finally, FERC "compares" these two "prices" and finds that "the result of the required comparison is always the same for regulated-deregulated gas" (Pet. Br. 24-25), *i.e.*, the infinite "price" is always highest and the deregulated category always applies.

The only problem is that Congress did not ask for this "comparison"; it did not provide that "the provision which *sets* the highest price shall be applicable." Instead, Congress provided for a comparison of the prices which "*could result*" under a provision providing "for any maximum lawful price" and a provision providing "for any exemption from such a price." 15 U.S.C. § 3311(b)(5). Congress clearly contemplated that there would be some actual defined price attached to each category, *including the deregulated category.*

That actual defined price is the contract sale price. Contract prices are *real* values requiring a *real* comparison, and it is this real comparison that Congress chose to require—not a hollow comparison between a finite and an infinite sum. "It cannot be presumed that the legislature would do a futile thing." 2A C. Sands, *Sutherland*

Statutory Construction §§ 45.12, 46.06 (4th rev. ed. 1984).

B. Congress Intended for the Provision Which Could Result in the Highest Sale Price to Apply.

This Court has "repeatedly recognized" that when "'the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.'" *United States v. James*, 106 S. Ct. at 3122 (citation omitted). Those circumstances require "'something to make plain the intent of Congress that the letter of the statute is not to prevail.'" *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (citation omitted). "[W]e look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n.12 (1987).

1. The Legislative Statements on Section 101(b)(5) Show That Congress Intended To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.

In this case, the legislative history strongly supports the unambiguous text of section 101(b)(5). Nowhere does the history contain any statement of "clearly expressed legislative intention" contrary to the text of the provision; in fact, the history contains two authoritative statements supporting the "natural meaning" of that text. The first appears in the "Explanation Statement" prepared for the House of Representatives by the House conferees (Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). 124 Cong. Rec. 38,363-64 (1978). In discussing section 101(b)(5), the conferees emphasized that although that section determined the proper treatment of dually-qualified natural gas, it did

> not impose upon either the FERC or any state agency an affirmative obligation to identify which

> of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

124 Cong. Rec. 38,363-64 (1978).

Therefore, when a producer examines section 101(b)(5) and its relationship to the pricing categories in sections 102-109, he is not to consider ceiling prices (or exemptions therefrom) in the abstract. Rather, he is to determine the category of the "greatest benefit *to him*," which will presumably be the category which "*yields* the highest price." *Id.* (emphasis supplied). In making this determination, the producer must refer to the sales contract for the well in question; it is that contract, not the NGPA, which "yields" a sales price for this gas. The NGPA simply assures the producer that *when* a well is qualified in the category which "yields the highest price" to "him," that category "shall be applicable" under section 101(b)(5). *Id.*

Further support for this principle comes from the most determinative piece of legislative history pertaining to the NGPA, the joint House-Senate Conference Committee Report.[19] The Conference Report considered the question of dual-qualification in the context of its discussion on gas subject to existing intrastate contracts with a price in excess of $1.00 per MMBtu. Conf. Rep. at 83. Section 121(a)(3) "'deregulates' [that] category for ceiling price purposes." *Id.* Nonetheless, section 121(e) provides that any gas that is deregulated "solely by reason" of its qualification in that category and that is sold "at a price established under an indefinite price escalator

---

[19] *See* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 115 (1980) ("This report, which detailed the selection and construction of each section of the bill, is the most authoritative evidence of Congress' intent. It is almost as much a part of the NGPA as the bill's text.").

clause" shall be subject to a limitation on the operation of those clauses found in section 105(b)(3), even though "the ceiling prices for such gas are removed pursuant to section 121(a)(3)." Conf. Rep. at 83; 15 U.S.C. § 3331(e).

In discussing these provisions, the Conference Committee directly addressed the question of gas that was dually-qualified as a stripper well *and* an existing intrastate well priced in excess of $1.00 per MMBtu. Conf. Rep. at 83. Would that gas *always* be price-deregulated under section 121(a)(3)? Or could that gas still receive incentive pricing under section 108? The Conference Report squarely indicates that producers could *continue* to price and sell their gas as price-regulated gas under section 108, without any limitation on indefinite price escalators, notwithstanding the "deregulation" of the overlapping intrastate category:

> [N]atural gas qualifying as gas produced from a natural gas stripper well would not be so limited, **if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.**

Conf. Rep. at 83 (emphasis supplied).

This Report states that dually-qualified gas *can* be priced and sold in the price-regulated category; section 101(b)(5) does *not* require the price-deregulation of such gas. Indeed, the Conference Committee could not have been clearer in its view that "natural gas qualifying as gas produced from a natural gas stripper well" which also qualifies "as an existing intrastate contract" can be "sold subject to the provisions of sec. 108, rather than taking deregulated treatment." *Id.*[20]

[20] In attempting to distinguish this statement, FERC suggests that it refers to "the overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3))." Pet. Br. 38 n.32. This suggestion is mistaken. First, section 105(b)(3) is not a "category" at all, but a limitation on the operation of price escalators in existing intrastate contracts. 15 U.S.C. § 3315(b)(3). Second, the "category" of natural gas covered by "existing intrastate contracts" priced in excess of $1.00 per MMBtu *was* deregulated in section 121(a)(3). *See* Conf. Rep. at 92 ("the agreement '*deregulates*' those categories for ceiling price purposes") (emphasis supplied); Conf. Rep. at 83 ("natural gas which is *deregulated* solely as a result of qualifying as an existing contract") (emphasis supplied). Third, the Conference Report expressly refers to the option of "taking deregulated treatment" on stripper well gas subject to an existing intrastate contract. Conf. Rep. at 83. If the situation really involved an "overlap of two regulated categories" (Pet. Br. 38 n.32), "taking deregulated treatment" would not be an option.

In contrast to these two clear statements, FERC relies on two other statements, one by an individual Senator, which make the obvious point that when gas is qualified in both price-regulated and price-deregulated categories, the deregulated category can become applicable under the proper circumstances. Pet. Br. 37 & n.31.[21] Dually-qualified gas *will* be treated in the price-deregulated category whenever that category "could result in the highest price." 15 U.S.C. § 3311(b)(5). At the time of the NGPA debate in 1978, some congressmen believed that sale prices for price-deregulated gas *would* exceed the sale prices for price-regulated gas by the year 1985. Pet. App. 22a; *see also* 124 Cong. Rec. 38,361 (1978) (Rep. Dingell); 124 Cong. Rec. 31,819 (1978) (Sen. Metzenbaum). Statements on how section 101(b)(5) would operate in those circumstances provide no guidance on its operation in other circumstances.

In sum, the legislative history supports the construction of the court of appeals. Despite an exhaustive re-

[21] The statement of Sen. Bartlett corrected a misunderstanding on whether stripper wells were price-deregulated under section 121. *See* 124 Cong. Rec. 31,387 (1978). The reference from the House "Explanation Statement" simply stated that dual-qualification "would *permit* the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." 124 Cong. Rec. 38,364 (1978) (emphasis supplied).

view and discussion of that history, FERC cannot cite a single comment undercutting the court of appeals' construction. In the end, FERC can do no more than claim that "the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions." Pet. Br. 37. Such contradictory statements hardly provide the "clearly expressed legislative intention" necessary to overcome the clear meaning of the statute itself. *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1213 n.12.

2. *The "Broad Purposes" of the NGPA Support Congress' Decision To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.*

Unable to locate any "clearly expressed legislative intention" contrary to the court of appeals' interpretation of section 101(b)(5), FERC invokes the "broad purposes" of the statute. Here, FERC asserts that the "broad purpose" of the statute was to achieve price deregulation and prevent payment of "above-market" prices. Pet. Br. 28-38. This argument is seriously misplaced. First, as this Court recognized in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986):

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Therefore, even if the "broad purpose" of the NGPA were to deregulate all gas, that "broad purpose" could not override a specific provision to the contrary. *Dimension*, 474 U.S. at 374.

Above all, however, the "broad purpose" of the NGPA was *not* price-deregulation as an end in itself; rather, as this Court has discerned, the "broad purpose" was "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Phased-in, partial deregulation was one *means* of accomplishing this purpose. Incentive pricing for difficult-to-produce gas was another.[22] Even FERC concedes that some of the original incentive categories remain price-regulated to this date, unquestionably permitting regulated incentive prices for single-category gas not qualifying for price-deregulated treatment. 15 U.S.C. §§ 3317(c)(5), 3318.[23]

As a second, closely-related "broad purpose," FERC suggests that Congress wanted to prevent sellers from collecting "above-market" prices for their gas. Pet. Br. 28-38. But the simple fact is that Congress left the matter of gas pricing to private contracts. With respect to regulated gas, the only restriction is that the contract price not exceed the applicable ceiling price; if the seller can succeed in contracting for a price above the "market" but below the ceiling, the NGPA will not interfere. Nor will the NGPA interfere with a contract which sets an "above-market" price for price-deregulated gas. In other words, the potential for "above-market" pricing

---

[22] Members of this Court have commented on the economic impact of these incentive prices for difficult-to-produce gas. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 436 (1986) (Rehnquist, J., dissenting) ("High-cost gas makes up only a tiny fraction of the aggregate supply of natural gas. *See* Pierce, 68 Va. L. Rev. at 88 n.98 (about 1%). Thus, any increased costs associated with it will tend to be a mere drop in the bucket.").

[23] FERC continues to publish these incentive prices in the Federal Register on a quarterly basis. *See* 53 Fed. Reg. 3,019 (1988).

will *always* exist under the NGPA; even FERC's construction will not eliminate that possibility.[24] Accordingly, FERC cannot rewrite the text of the statute based upon an alleged congressional "intent" to eliminate "above-market" prices.

In view of FERC's own, repeated warnings that the NGPA is not "concerned with the private contract prices at which particular gas is sold" (Pet. Br. 19, 26-27), it is surprising that FERC would even challenge the court of appeals' ruling on the theory that it could lead to "higher-than-market" prices. *See* Pet. Br. 21. Respondents agree with FERC that "Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision." Pet. Br. 26. Under the terms of the court of appeals' decision, gas buyers and gas sellers will continue to enter into private sales contracts setting different prices for different NGPA categories of gas. These prices may be less than, greater than, or equal to the "market price." Section 101(b)(5) simply provides when gas is qualified in two categories, the category which carries the highest sale price "shall" apply. 15 U.S.C. § 3311(b). This determines the applicable pricing category under the NGPA, but it does not fix or "establish" the price in any way. The actual sales price for all categories, including the highest-priced category, remain subject to "private decision." Pet. Br. 26. Nothing in section 101(b)(5) or the court of appeals' opinion automatically entitles the seller to a "higher-than-market" price.

[24] FERC seems to believe that deregulation will automatically result in the payment of "market prices" for natural gas. *See* Pet. Br. 19, 28-35 ("the deregulated (market) price"). This is incorrect. As the court of appeals recognized, natural gas is often sold under long-term contracts which generally "'contain two clauses—one which sets the price if gas is regulated and one which is implemented if gas is deregulated.'" Pet. App. 16a n.11 (quoting 49 Fed. Reg. at 46,878). Although the clause pertaining to deregulated gas *may* refer to a "market price," it may also refer to a fixed price above or below the "market." *Id.* The NGPA does not require the payment of "market" prices for deregulated gas. *See* 15 U.S.C. § 3311(b)(9).

FERC itself has emphasized this point as recently as this month. *See* Order No. 459-A, 53 Fed. Reg. 3,754, 3,756 (1988). In declining to reduce the regulated incentive price for high-cost gas under section 107(c)(5), FERC stated:

> The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price. The Commission expects the parties to negotiate an appropriate price for the purchase and sale of high-cost gas in the market. The Commission expects that parties to a contract would renegotiate a "problem contract" if the contract term is no longer market-responsive. The Commission, therefore, expects that the current market will serve to limit incentive prices to competitive levels. Such competitive market forces should be given a chance to operate before any decision is made that regulatory measures are needed to limit incentive prices.

Id. Therefore, while FERC informs this Court that price-regulation leads to above-market pricing (Pet. Br. 31-35), FERC informs the public that that is not necessarily the case.[25]

[25] As FERC recognized, even single-category price-regulated gas may be sold at a price other than the incentive price. Indeed, producers of tight formation gas may desire to sell those gas supplies at prices *below* the regulated incentive prices. The Crude Oil Windfall Profits Tax Act of 1980 permits a producer to obtain tax credits for the production of fuel from non-conventional sources, including tight formations. 26 U.S.C. §§ 29(a), (c) & (e) (Supp. II 1984). However, to receive the tax credit, the gas must be price-regulated and the producer must elect not to receive an incentive price for such gas. 26 U.S.C. §§ 29(c)(2)(B), (e).

3. *Changes in Economic Conditions Do Not Provide FERC with a License To Rewrite the Statute.*

Since FERC cannot show how the court of appeals' holding violates *either* a "clearly expressed legislative intention" or a "broad purpose" of the NGPA, FERC asserts that Congress could not possibly have foreseen the future operation of section 101(b)(5). Pet. Br. 28-38. According to FERC, Congress in 1978 failed to foresee the potential for low market prices in 1985, and hence could not have anticipated that contract pricing provisions "could result" in a higher price for price-regulated than price-deregulated gas under the terms of section 101(b)(5). *Id.*

This argument is factually incorrect. The very purpose of *phased-in* price-deregulation was to wait until the producers had discovered sufficient supplies of "new" gas to hold the market prices down. *See, e.g.*, 124 Cong. Rec. 28,879 (1978) (Sen. Melcher) ("Under the terms of this, getting above $2.00, which it will in 1979 for new gas, it could probably bring in a lot more gas than we could envision at this time. So we might reach the point of additional supply."); 124 Cong. Rec. 31,845 (1978) (Sen. Glenn) ("[T]his legislation keeps the lid on prices during that period until production increases sufficiently to a point where there is enough supply that competition will effectively hold prices down."). Congress clearly understood the possibilities and enacted section 101(b)(5) in full view of those possibilities.

Yet even if section 101(b)(5) did generate an unexpected result in today's economic climate, that would authorize neither FERC nor the Court to rewrite the statute: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA v. Hill*, 437 U.S. at 185. "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to

achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). Accordingly, a court may not "attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.* "If the [statute] falls short . . . that is a problem for Congress, and not the [agency] or the courts, to address." *Dimension*, 474 U.S. at 374.

In attempting to rewrite the statute, FERC is reasserting the positions condemned by this Court in *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). In that case, FERC had issued orders which effectively prevented the interstate pipelines from receiving incentive prices on gas produced from their own wells. *Id.* at 322-24. FERC defended these orders with many of the same arguments it advances here, contending that they were necessary to prevent unfairness to the consumer, to preclude an "unintended windfall" to the pipeline-producer, and to fulfill the "implicit" intentions of Congress. *Id.* at 339, 341. In rejecting these arguments, this Court recognized that the NGPA established a "comprehensive regulatory scheme," 463 U.S. at 339, and that "[g]iven such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded" from incentive pricing. *Id.* at 336. "Yet nowhere in the NGPA do we find any expression of a desire to exclude pipeline production." *Id.* at 337.

This same principle applies in this case. Given the "comprehensive regulatory scheme" of the NGPA, Congress clearly would have said if it wanted all dually-qualified regulated-deregulated gas to be treated in the price-deregulated category. Congress did not say that. Instead, Congress said that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

C. Because Congress Has Manifested Its Intent in Section 101(b)(5), the Court Should Not Defer to a Contrary Interpretation of the Agency.

As a final point in its brief, FERC suggests that its construction of the statute, even if "less than crystal clear" (Pet. Br. 39), is nonetheless entitled to "deference" (Pet. Br. 39-40). This suggestion is misplaced. As this Court has recognized, "'[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1221 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). This rule applies notwithstanding any tradition of "deference" to agency interpretations. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Dimension*, 474 U.S. at 368.

In this case, "traditional tools of statutory construction" clearly and unambiguously reveal that Congress intended for gas qualified in both price-regulated and price-deregulated categories to be treated in the category which results in the highest sale price. 15 U.S.C. § 3311 (b)(5). Accordingly, that must be "the end of the matter" for both the agency and the Court. If FERC believes that these clearly-expressed legislative intentions are inappropriate, it should revisit the issue with Congress. Gas consumers and gas producers could then debate not just section 101(b)(5), but the entire NGPA compromise. Elected representatives would then have the opportunity to remake the law. In sum, "[i]f that provision is to be changed, it should be by Congress and not by this Court." *United States v. James*, 106 S. Ct. at 3125.

D. Section 121 Does Not Override or Nullify the Meaning of Section 101(b)(5).

In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 argue that that section does not apply to dually-qualified regulated-deregulated gas. Br. 10-11. Instead, these petitioners contend that section 121 controls the situation, requiring price-deregulation for any gas qualified in one of the listed categories even if it also qualifies in a category that remains price-regulated. Br. 10-11. Petitioners assert that section 121 is "not ambiguous" in this regard. *Id.*

This argument is untenable. On its face, section 101(b)(5) expressly refers to "sales qualifying under more than one provision," including provisions providing for "any maximum lawful price" and provisions providing for "any exemption from such a price." 15 U.S.C. § 3311(b)(5). Reference to other portions of the NGPA removes any doubt that the "provisions" providing for "any exemption from such a price" are the price-deregulation provisions of section 121. In section 101(b)(9), for example, Congress expressly stated that the provisions providing for an "exemption from such a maximum lawful price" are the provisions of "part B of this subchapter," *i.e.*, those in section 121. 15 U.S.C. § 3311 (b)(9). "There is a presumption that the same words used twice in the same act have the same meaning." 2A C. Sands, *Sutherland Statutory Construction* § 46.06 (4th rev. ed. 1984). Accordingly, section 101(b)(5) expressly applies to gas qualified in both a price-regulated category under part A and a price-deregulated category under part B.

FERC, the only petitioner claiming the right to deference in this case, interprets section 101(b)(5) to apply to dually-qualified regulated-deregulated gas. *See, e.g.*, Interim Rule Covering High-Cost Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23

(1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."). FERC does "not renew" any argument to the contrary at this time. Pet. Br. 21 n.20. Therefore, the petitioners in No. 87-364 are advancing an argument that has met rejection not only from the respondents, but from FERC and the court of appeals as well.

In contrast to the clear and express applicability of section 101(b)(5), section 121 is totally silent on the issue of dually-qualified gas. That section extends price deregulation only to the "specifically enumerated" categories. Conf. Rep. at 92. In providing for the price deregulation of "a number of categories," *Mid-Louisiana*, 463 U.S. at 336 n.14, section 121 says nothing about gas which is qualified both in those categories and in the price-regulated categories. In view of this silence, and in view of the direct applicability of section 101(b)(5), it is clear that section 121 does not "mandate" the deregulation of dually-qualified gas.

E. The Court of Appeals Correctly Concluded That FERC Has No Authority To "Automatically" or "Implicitly" Qualify New Tight Formation Gas as New Gas Under Section 102(c) or 103.

In addition to its attempt to deregulate all dually-qualified gas, FERC has also attempted to insure that the maximum volume of gas becomes dually-qualified in both a price-regulated and a price-deregulated category. Therefore, FERC has announced that any well qualified in a price-regulated category as "new tight formation gas" under section 107(c)(5) also "automatically" and "implicitly" qualifies in a second, price-deregulated category as "new natural gas" under section 102 or "new, onshore production" gas under section 103. Pet. App. 81a-82a, 114a-115a. This determination has significance

in conjunction with FERC's mandated price-deregulation of dually-qualified gas; if dually-qualified gas were not price-deregulated, then FERC would have a lesser interest in dual-qualification. Nonetheless, its "implicit" determination of a dual-qualification still could not stand.

Section 503 of the NGPA expressly states that "[a] Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a)," including determinations with respect to "new natural gas" under section 102, "new, onshore production wells" under section 103 and "high-cost natural gas" under section 107(c). 15 U.S.C. §§ 3312, 3313, 3317(c), 3413(c)(1). Only "[i]f such agency executes [a] waiver" can FERC "make the determinations which would otherwise be made by such Federal or State agency." 15 U.S.C. § 3413(c)(2)(A). "Unless the jurisdictional agency waives its role, in writing, it is to make the initial determination of whether specific gas satisfies the factual criteria for a particular category of incentive-priced gas." *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 780 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 748 (1988).

The legislative history of the NGPA is replete with evidence that section 503 means what it says: natural gas category determinations are made by state and federal jurisdictional agencies upon application from the producer. *See, e.g.*, Conf. Rep. at 74, 118; 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement); 124 Cong. Rec. 17,481 (1978) (Sen. Domenici). In the absence of a properly-executed waiver, FERC would have no authority to make such a determination *even if* the producer presented FERC with an application. Clearly, FERC has no authority to make those determinations in the absence of an application.

The Conference Report leaves no room for debate on this matter:

> [T]here is no intention to allow the Commission to "second guess" the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission.

Conf. Rep. at 118.

"The Federal Government will *not* be allowed to establish a separate bureaucracy for making the determinations required by this law." 124 Cong. Rec. 17,481 (1978) (Sen. Domenici) (emphasis supplied). "If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

Even *these* agencies have no authority to act without an application. Therefore, while "a producer may claim or apply for the highest price to which he is entitled," there is no "duty to compel a State or Federal agency to search through the various price classifications under the act and find the highest permissible price." 124 Cong. Rec. 29,109 (1978) (Sen. Jackson). "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement).

FERC cannot seriously contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 102(c) or 103. Nor can FERC contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 107(c)(5). Nonetheless, FERC purports to have the authority under its "broad" rulemaking powers to issue unsolicited "determinations" that most new tight formation wells under section 107 (c)(5) are also qualified under section 102 or 103. Pet. Br. 41.

FERC has tried this once before. In *Williston Basin*, FERC claimed that it had made "case-by-case 'tight formation' determinations not through the procedures of section 503 but rather through somewhat different procedures of its own devising, for which it claimed authority in its broad rulemaking powers under section 501 of the NGPA." 816 F.2d at 781 (footnotes omitted). The United States Court of Appeals for the District of Columbia Circuit rejected this approach, holding that "[t]he parties' contention that FERC may avoid the specific procedures of section 503 by relying instead on its general rulemaking authority under section 501 renders section 503 nothing more than a mere suggestion from Congress for FERC to take or not as it likes." *Williston Basin*, 816 F.2d at 782-83. "Congress clearly intended that these designations would be made through the procedural scheme it enacted for that specific purpose, and section 503 was that scheme." *Id.* at 783.

This Court should reach the same result. FERC does not have authority to make *any* unsolicited well category determinations, regardless of whether those determinations are "implicit," "automatic" or based upon earlier jurisdictional agency determinations. The NGPA does not provide for "implicit" or "automatic" determinations. Pet. Br. 18a-19a. Congress gave FERC considerable authority under the NGPA, including the authority to define the requirements of new tight formation gas, but Congress did not give FERC the authority to make well category determinations. Conf. Rep. at 118.[26] Con-

[26] Near the end of its brief, FERC defends its "implicit" well category determinations on the theory that they are "in all relevant respects identical" to a redefinition of new tight formation gas. Pet. Br. 42. But the fact that FERC may have been able to achieve the same result through lawful means does not excuse its choice of an unlawful means. *Compare Singer v. Wadman*, 745 F.2d 606, 609 (10th Cir. 1984) (unlawful to commit "a lawful act by unlawful means"), *cert. denied*, 470 U.S. 1028 (1985).

gress gave that authority to state and federal jurisdictional agencies. 15 U.S.C. § 3413.

This Court has long recognized that an agency cannot exceed the scope of authority delegated by Congress, whether by regulation or administrative interpretation.[27] And just as an agency cannot exceed its granted jurisdiction, an agency also cannot use the "power to issue regulations" to "extend a statute or modify its provisions." *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). Clearly, an agency cannot "bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Agency "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Dimension*, 474 U.S. at 374.

In this case, FERC has used its rulemaking powers to extend the bounds of its authority. FERC has "implicitly" and "automatically" made the well category determinations that Congress has entrusted to others. The court of appeals properly rejected this inappropriate exercise of rulemaking power.

---

[27] *See, e.g., Peters v. Hobby*, 349 U.S. 331, 345 (1955); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *International Ry. v. Davidson*, 257 U.S. 506, 514-15 (1922); *United States v. Wickersham*, 201 U.S. 390, 398 (1906); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Counsel for Respondents Martin Exploration Management Company and Colorado Energy Corporation

[And on behalf of Additional Respondents Listed on Following Pages]

Dated: February 16, 1988

JEFFREY S. DAVIDSON
Counsel of Record
STEPHEN A. HERMAN, P.C.
JAMES D. SENGER
YOSEF J. RIEMER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

AMOCO PRODUCTION COMPANY
WILLIAM T. BENHAM *
200 East Randolph Drive
P.O. Box 5910-A
Chicago, Illinois 60680
(312) 876-7941

BHP PETROLEUM COMPANY, INC.
WILLIAM S. MARTIN *
5051 Westheimer
1300 Post Oak Tower
Houston, Texas 77056
(713) 780-5313

CITIES SERVICE OIL & GAS CORP.
MICHAEL L. PATE *
P.O. Box 300
Tulsa, Oklahoma 74102
(918) 561-4541

GRACE PETROLEUM CORPORATION
CHARLES H. SHONEMAN *
BRACEWELL & PATTERSON
2000 K St., N.W., Suite 500
Washington, D.C. 20006-1809
(202) 828-5800

OHIO OIL AND GAS ASSOCIATION
M. HOWARD PETRICOFF *
W. JOHNATHAN AIREY
VORYS, SATER, SEYMOUR
AND PEACE
52 East Gay St.
Columbus, Ohio 43215
(614) 464-5414

PHILLIPS PETROLEUM COMPANY
JOHN L. WILLIFORD
CHARLES L. PAIN *
1258 Adams Building
Bartlesville, Oklahoma 74004
(918) 661-6355

ARCO OIL AND GAS COMPANY
HARRIS S. WOOD *
P.O. Box 2819
Dallas, Texas 75221
(214) 880-4869

CHEVRON U.S.A., INC.
JAMES B. ATKIN *
DAVID J. EVANS
PILLSBURY, MADISON & SUTRO
1667 K St., N.W., Suite 1100
Washington, D.C. 20006
(202) 887-0300

EXXON CORPORATION
C. ROGER HOFFMAN
DOUGLAS W. RASCH *
P.O. Box 2180
Houston, Texas 77001
(713) 656-1691

INDEPENDENT OIL AND GAS
ASSOCIATION OF WEST VIRGINIA
R. GORDON GOOCH *
TRAVIS AND GOOCH
1101 15th St., N.W., Suite 1200
P.O. Box 65688
Washington, D.C. 20035-5688
(202) 457-9100

PLACID OIL COMPANY
RONALD D. HURST *
PAUL W. HICKS
3900 Thanksgiving Tower
Dallas, Texas 75201
(214) 880-1000

PENNZOIL COMPANY
JOHN B. CHAPMAN *
KATHELENE E. MAGRUDER
Pennzoil Place
700 Milam Street
Houston, Texas 77002 .
(713) 546-8859

JOHN MCDONALD
RICHARD E. POWERS, JR.
BUTLER & BINION
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20005
(202) 466-6900

UNION OIL COMPANY OF
CALIFORNIA
KENNETH L. RIEDMAN *
Room 907
P.O. Box 7600
Los Angeles, California 90051
(213) 977-7768

SHELL OFFSHORE, INC.
SHELL WESTERN E&P, INC.
THOMAS G. JOHNSON *
One Shell Plaza
Houston, Texas 77001
(713) 241-4742

UNION PACIFIC RESOURCES
CONSTANCE D. COLEMAN *
801 Cherry Street
P.O. Box 7, MS 4010
Ft. Worth, Texas 76101-0007
(817) 877-7540

* Counsel of Record